



Appeal of Richard Korando and  
Estate of Alida D. Korando, Deceased

The issue presented in this appeal is whether a parcel of real property was sold by **Alida D. Korando** in July of 1977 or by her estate in August of 1979.

**Alida D. Korando**, a woman approximately 80 years old, held as her separate property a parcel of commercial real estate in Santa Monica. 'A portion of this property was leased by Mrs. **Korando** to Jacques P. Don **Salat** and Madeline H. Don **Salat** who, like **Alida Korando**, were natives of France.

**Alida Korando** was hospitalized on April 26, 1977, because of a stroke. While she was hospitalized, Mrs. **Korando** met with the Don Salats and allegedly discussed the sale of the Santa Monica property.. On April 28, 1977, a grant deed was drawn which would transfer ownership of the real property to the Don Salats. Mrs. **Korando** signed this deed on July 9, 1977. The escrow was closed on July 19, 1977, and the deed was given to the Don Salats. The terms of the sale were that Mrs. **Korando** would receive a down payment of \$150,000 plus the Don Salats' note for \$350,000. This note was payable at \$3,000 a month with no interest.

On July 26, 1977, Mrs. Korando's attorney, John W. Erpelding, f'iled a notice of rescission on behalf of Mrs. **Korando**. The alleged basis of the rescission was: (1) undue influence by the Don Salats; (2) fraud by the Don Salats; (3) mistake of fact by Mrs. **Korando**; and (4) temporary incompetence of Mrs. **Korando**. Mr. Erpelding allegedly placed the down payment given to Mrs. **Korando** by the Don Salats in a trust account; however, the terms of this alleged trust agreement have not been made available. The Don Salats did not accept the proposed rescission.

Mrs. **Korando** died in late September of 1977. On November 11, 1978, the executor of Mrs. Korando's estate, Security Pacific National Bank, petitioned the superior court to confirm its recommendation **not to** proceed with the rescission action. The superior court accepted the recommendation on December 22, 1978.

On August 14, 1979, a release was signed by the Don Salats, Mr. Richard **Korando** and Security Pacific National Bank whereby the **parties released** each other from any and all claims on actions relating to the sale of the Santa Monica property to the Don Salats by **Alida Korando**. The Don Salats paid the bank an additional

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\$6,200. As a result of this disposition, the Santa Monica property remained the Don Salats" real property.

The joint return filed on behalf of Richard and **Alida Korando** for 1977 reported the sale of the property to the Don Salats. Cost was used as the basis of the property, but the return failed to include in the sale price the \$150,000 down payment received by Mrs. **Korando**. After an audit by respondent on January 16, 1979, appellants filed an amended return to reflect the down payment received and paid **\$12,700.41** in additional tax. On April 15, -1981, appellants filed a second amended return claiming a refund based on Mrs. Korando's alleged rescission delaying the effective date of **the** sale until 1978. On an amended return for its fiscal year ended March 31, 1979, the Estate of **Alida D. Korando** reported the sale using the fair market value of the property on the date of Mrs. Korando's death as its basis.

Respondent denied the refund because it found that the sale occurred in 1977 for tax purposes. **Respondent** further found that, because the real property was not acquired from a decedent, the property was not entitled to a "stepped-up" basis.

On appeal, appellants contend that the sale did not take place **in** 1977, because of the unilateral rescission by **Mrs. Korando**, and that a new sales contract was entered into in August of 1979.

**It** is well established that when a contract for the sale of land is induced by fraud, the contract may be rescinded or it may be ratified or affirmed since it is not void per se but rather is valid until the fraud is shown. The fraud will not be presumed. (54 **Cal.Jur.3d**, Real Estate Sales, § 430, p. 581.) A person who has been defrauded may choose his remedy. To establish his right **to** damages, however, the injured party must ultimately waive his right to rescind and affirm the contract. **In** other words, the defrauded party cannot **elect** to both rescind and collect damages for fraud, as these two remedies are mutually inconsistent. (1 (Pt. 2) Miller & Star, Current Law of California Real Estate (rev. ed. 1975), § 5:5, p. 96.)

The facts available **show that** within one month of signing the deed, Mrs. **Korando**, through her attorney, gave notice of rescission to the Don Salats in accordance with section 1691 of the Civil Code. This notice was an

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offer to rescind which the Don Salats chose not to accept. When the offer to rescind was rejected, neither Mrs. **Korando** nor her estate sought relief as provided by section 1692 of the Civil Code. Furthermore, in a petition dated November 22, 1978, to the Los Angeles Superior Court for instructions, the executor for Mrs. Korando's estate, Security Pacific National Bank, concluded that there were no grounds for rescission and that the sales price paid by the Don Salats was fair, if not excessive. This conclusion was accepted by the superior court when it issued an order providing, "That having found the proposed action to rescind is not recommended, the sale of real property located at 2628-36 Wilshire Boulevard, Santa Monica, California, to Jacques and Madeleine Don **Salat** is approved." (Order Sup. Ct. Los Angeles Co., No. **14135** (Dec. 22, 1978).) Given these facts, we must conclude that the sale by Mrs. **Korando** to the Don **Salats** was not rescinded.

As cash basis taxpayers, Mr. and Mrs. **Korando** were required to report their gross income when it was actually or constructively received. When the escrow for the sale of the Santa Monica property closed on July 19, 1977, Mrs. **Korando** received the \$150,000 down payment and the Don Salats received title to the property. Her unconditional receipt of this money is not disputed. Consequently, with closing of the escrow, Mrs. **Korando** was in receipt of income pursuant to the cash method of accounting. The subsequent placing of the \$150,000 down payment into a trust account does not negate Mrs. **Korando**'s receipt of that income. (See Kamm's Estate v. Commissioner, 349 F.2d 953 (3d Cir. 1965).)

For the reasons discussed above, we conclude that Mrs. **Korando** sold the property in July of 1977, that her basis in the property was its cost (Rev. & Tax. Code, § 18042), and that the \$150,000 down payment was part of the sales price. Accordingly, respondent's action denying the refund claim must be sustained.

O R D E R

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Richard **Korando** and Estate of **Alida D. Korando**, Deceased, for refund of personal income tax in the amount of \$24,173 for the year 1977, be and the same is hereby sustained.

Done at Sacramento, California, this 5th day of April, 1984, by the State Board of Equalization, with Board Members Mr. Nevinn, Mr. Dronenburg, Mr. Bennett and Mr. Harvey present.

<u>Richard Nevins</u>	, Chairman'
<u>Ernest J. Dronenburg, Jr.</u>	, Member
<u>William M. Bennett</u>	, Member
<u>Walter Harvey*</u>	, Member
	, Member

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